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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

GEORGE J. LAMBERT,

Petitioner,

v.

PROVIDENCE JOURNAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RODERICK A.J. CAVANAGH,
STEPHEN D. KEEFFE
Attorneys for Petitioner

OF COUNSEL:
KEEFFE BROTHERS
733 15th Street, N.W.
Washington, D.C. 20005

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CASE REPORTED BELOW

The opinions of the Court of Appeals and the District Court are reprinted as Appendices A and B, respectively, hereto.

JURISDICTION OF THIS COURT

The jurisdiction of this Court in the present case is founded upon 28 U.S.C. § 1254(1) which gives this Court authority to review, by writ of certiorari, the judgment of a United States Court of Appeals in a civil case.

The judgment in this case of the United States Court of Appeals for the First Circuit was filed on January 7, 1975.

QUESTIONS PRESENTED

1) Whether the Court of Appeals in sustaining the grant of a Motion for Summary Judgment by a lower Court which refused to hear oral argument or grant a jury trial has confused the status of libel actions in State Courts.

2) Whether the instant case conflicts with the various standards set out by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296 (1971); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), thereby confusing the status of state libel actions.

APPLICABLE RULES OF PROCEDURE INVOLVED HEREIN

Rule 19(1)(b) Supreme Court Rules

Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF FACTS

On October 6, 1972 the Plaintiff, George J. Lambert was the owner and operator of a business located at 425 South Main Street, Fall River, Massachusetts, known as the Camelot

Inn. On that day a patron of the Camelot Inn, namely Thomas F. McCabe was involved in an incident at that establishment resulting in the death of McCabe. In connection with that incident the Plaintiff was first charged with being an accessory after the fact to murder in relation to the death of McCabe. Later Lambert was charged with murder which at a bindover hearing was reduced to manslaughter. Lambert was tried in the Superior Court for Bristol County sitting in New Bedford, Massachusetts, before a jury and was acquitted. Edward Smialek was also charged with the crime of murder in connection with the same incident; but, he was found not guilty at the bindover hearing.

During the period from the initial incident at the Camelot Inn to the acquittal of Lambert, the Defendant Providence Journal Company published four articles dated October 8, 1972, October 13, 1972, December 28, 1972 and February 18, 1973, concerning the Plaintiff which are the subject of this action. (They are reprinted in Appendix B as footnotes to the opinion of the District Court of Rhode Island). The Plaintiff alleges that he was libeled in the State of Rhode Island and in the Commonwealth of Massachusetts by these four false and defamatory publications. Those articles have been admitted to have been published and distributed by the Defendant within the State of Rhode Island and the Commonwealth of Massachusetts. The Plaintiff alleged that the Defendant through the four-above-described articles falsely and maliciously published such libelous statements by stating that the Plaintiff had murdered one Thomas McCabe and that in doing so he had committed "an actual murder" (Footnote 5, Appendix B, p. 26) and further that Thomas McCabe was a murder victim.

This is a diversity action for multistate libel originally filed in the United States District Court for the District of Rhode

Island. A jury trial was requested. The trial court found that it had jurisdiction. The Defendant filed a Motion for Summary Judgment together with supporting affidavits, deposition of the Plaintiff and supporting memorandum. The Plaintiff filed an objection to the Motion for Summary Judgment together with a memorandum in opposition to the motion, opposing affidavits and opposing depositions. The trial court after considering the matter on memorandum without granting to either counsel their request for oral argument granted Defendant's Motion for Summary Judgment. The Court of Appeals for the First Circuit affirmed on appeal.

I. THE COURT OF APPEALS ERRED IN SUSTAINING THE GRANT OF A MOTION FOR SUMMARY JUDGMENT BY A LOWER COURT WHICH REFUSED TO HEAR ORAL ARGUMENT OR GRANT A JURY TRIAL HAS SANCTIONED DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The trial court came to the factual conclusion that the events surrounding the articles complained of clearly constituted an issue of public or general interest. Not only did the trial court make this factual determination without a jury, but it also refused to hear oral arguments requested by both counsel and proceeded to grant Summary Judgment for the Defendant.

The case of *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974) specifically mandates that trial judges refrain from making such factual determinations. Mr. Justice Powell in speaking for the majority of the Court expressly held that the rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), as extended by *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) does not apply to private individuals when he stated:

> ". . . we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurity would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not – to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.' *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79. We doubt the wisdom of committing this task to the conscience of judges.
>
> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz v. Robert Welch, Inc., supra*, at 345-347.

Although *Gertz, supra*, was decided seven days after the District Court rendered its opinion, it is highly relevant in demonstrating the trial court's misinterpretation of existing law. Furthermore on review the Court of Appeals never mentioned *Gertz, supra*, in its opinion, which accentuates its double error; the affirmance of Summary Judgment and the necessity of a remand in light of *Gertz, supra*.

Therefore, the applicable state law should have been applied which holds that unless the words used by the Providence Journal were plain and unambiguous and incapable of carrying a defamatory innuendo there is a question of fact

for the jury. *Della Posta v. Rand Express Freight Lines*, 86 R.I. 148, 133 A.2d 775 (1957). However, the trial court found "To this court the reasonable and usual meaning of words used in the publication at issue are not capable of any defamatory meaning." (App. B, p. 7). The Court did not find the *unrebutted* testimony to the opposite effect proferred by three members of the community, to whom Defendant' publications were directed to be persuasive[1] (emphasis supplied). Clearly in the case at bar under the authority of *Gertz*, *supra*, and applicable state law this decision should have been a factual determination for the jury rather than the trial judge.

Moreover, one cannot ignore the facts of *Gertz*, *supra*, as it relates to Mr. Lambert. In *Gertz*, *supra*, the Petitioner was an attorney retained in a murder case with political overtones. The attorney for the victim's family, the Petitioner in that case, sued for libel. The *Gertz*, *supra*, Court held

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[1] Two factors are noteworthy at this point. By deferring to state law on libel questions, *Gertz*, *supra*, clearly contemplates the application of a community standard. The District Court Judge not only made his own "Findings of Fact' in a Motion for Summary Judgment, but also did so ignoring evidence from the community that a defamatory innuendo could be found by reasonable men.

Secondly, the deposition of one Mr. Borden, a real estate salesman, who bought the Camelot Inn after the trial because of Lambert's financial difficulty reveals that prior to the shooting and articles in the Providence Journal Mr. Lambert was "averaging somewhere around $3,000.00 a week." Subsequent "he was having trouble reaching $1,000.00." (Dep. of Edgar Borden, p. 175). After the change in ownership Borden's weekly gross was "$3,000.00 or better". The deposition of one Thomas Valencourt, a member of the Fall River Community, reveals that he and a group of friends decided not to patronize the Camelot Inn after reading the articles in question because "George Lambert had killed someone or murdered someone in there." (Dep. p. 201).

the *New York Times* standard inapplicable under both the "public figure" and "general interest" test (*Rosenbloom, supra*). The case was remanded for a new trial. If a factual determination was essential in the *Gertz, supra,* case, can there be any question that the trial judge in the case at bar not only grossly erred in taking the question out of the hands of a jury, but also in his decision, that the Fall River murders were matters of public interest?

In addition to ignoring the mandate of *Gertz, supra,* it is clear that the District Court misread *New York Times v. Sullivan, supra,* not only in holding that questions of fact in state libel actions are for the court and not for the jury, but also in resolving the malice issue. (The confusion with the case law will be discussed more fully, *infra*).

Finally, the correctness of the District Court's grant of Summary Judgment is open to serious question. The record clearly discloses questions of material fact upon which reasonable men could differ. The refusal of the First Circuit to overturn the grant of Summary Judgment cannot be justified. The Circuit Court avoided the malice issue and made a factual determination that the articles carried no defamatory meaning. The silence of the Circuit Court on the lower court's application of the *New York Times* rule, *supra,* to Lambert clearly suggests agreement. *Gertz, supra,* was unequivocal in stating that the *New York Times* test, *supra,* should not be extended to private individuals who have been injured by defamatory falsehoods. However, the District Court quite glibly proceeds under its interpretation of *Rosenbloom, supra,* to erroneously subject Mr. Lambert to the *New York Times* test, *supra,* when it states; "After all, what incident covered by the news media is not or does not become an event of public interest? Few will not qualify. . . ." (App. B at p. 16).

The time has come for the Supreme Court both to clarify the status of libel suits in state courts and to exercise its supervising power under Rule 19(1)(b) where a Court of Appeals has sanctioned the departure from the accepted and usual course of judicial proceedings by a lower court.

II. THE INSTANT CASE INDICATES THE CONFUSION OF THE STATUS OF LIBEL ACTIONS IN STATE COURTS AND THE NEED TO CLARIFY THE STANDARDS OF *NEW YORK TIMES* v. *SULLIVAN, SUPRA; ROSENBLOOM* v. *METROMEDIA, SUPRA,* AND *GERTZ* v. *ROBERT WELCH, INC., SUPRA.*

The holdings of the District Court and the Court of Appeals for the First Circuit are indicative of the confusion in the minds of not only four Judges, but also in State Courts generally as to the standards to be applied in a state libel action. Mr. Justice Powell begins his opinion in *Gertz, supra,* by saying; "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and freedom of the press", 318 U.S. at 325. However, *Gertz, supra,* and its predecessors have still not resolved the problems remaining after the *New York Times* decision, *supra;* among these problems are the definition and scope of application of the malice standard, the procedural safeguards which should accompany the "constitutional malice" standard and a clear definition of who or what are the classes of persons or events about which statements can be made with immunity under the First Amendment.

Although the problem of jury instructions never arose in *Lambert, supra,* this is another area of confusion; for the most part a by-product of the *Rosenbloom, supra,* decision. The Court there replaced the existing "preponderance of the

evidence" standard of proof for Plaintiffs in libel actions involving "public officials" or "public figures" to prove the elements of their cause of action by "clear and convincing evidence" *Rosenbloom, supra,* at 29, 30. The Court should clarify whether it is truly trying to fashion restrictive rules which would both protect the press and discourage libel actions where the alleged actions involve matters related to the public sector. The *Lambert* decision, *supra,* is a perfect example of the effect of the ambiguities in the *Rosenbloom* decision, *supra.* Rhode Island as well as other state courts have followed the *Rosenbloom* Court's apparent lead in making independent findings of fact on Motions for Summary Judgment to determine the existence of malice in cases where constitutional considerations so require. The end result of *Rosenbloom, supra,* then has been the granting of Defendant's Motions for Summary Judgment in a great many cases because of Plaintiffs' difficulties in meeting such a stringent burden of proof. The *Gertz* decision, *supra,* suggests that the Court did not contemplate this result at all when it states in reference to 'ad hoc' decisions by judges on what constitutes an issues of 'public interest': "We doubt the wisdom of committing this task to the conscience of judges." *Gertz, supra,* at 346.

The Court's difficulty in the libel area surfaced two years after *New York Times, supra,* in *Rosenblatt v. Baer,* 383 U. S. 75 (1966), where the Court suggested a definition of the minimal perimeters of the "public official" classification. *Id* at 85. The Court's uncertainty about its own definition was manifested by its remanding the case for trial. *Id.* at 277. A year later in *Curtis Publishing Company v. Butts,* 388 U.S. 130 (1967), the Court preferred an expanded but confusing class of "public figures", *Id.* at 164. Apparently in an attempt to be consistent with Chief Judge Warren's emphasis on "involvement in public issues" federal courts

expanded the *New York Times* rule, *supra*, to apply when the subject of the alleged defamatory publication was a matter of public interest. That *Rosenbloom, supra*, was a relatively unsuccessful attempt to confront the question of whether to extend the scope of the *New York Times, supra*, immunity to parties other than public figures or officials is evidenced by the fact that no more than three Justices could agree on any single standard of protection.

In *Gertz v. Robert Welch, supra*, the Supreme Court, with a majority of five, held that the constitutional privilege in *New York Times, supra*, does not extend to defamatory falsehoods where the individual is not a public official or public figure. The Court's focus on the status of the Plaintiff rather than subject matter of the publication is an apparent rejection of the plurality in *Rosenbloom, supra*. There was also a substantial deviation from the *New York Times, supra*, approach in that the Court's focus switched from the demands of the First Amendment to the legitimate state interest in the law of defamation. The *Lambert* case, *supra*, is indicative of the possible confusion emanating from the *Gertz* opinion, *supra*. The *Gertz, supra*, majority did not set out the precise scope of its holding, thereby subjecting it to various interpretations. For example, the factual similarity between *Gertz, supra*, and *Rosenbloom, supra*, could easily lead to *Gertz, supra*, being interpreted as limited to the situation where the defamatory statement concerns a private individual in matter of general interest.

Gertz, supra, also tried to reformulate the "public figure" concept originally enunciated by Mr. Justice Harlan in *Curtis, supra*, at 154, 155. Under the *Gertz, supra*, majority's reasoning "voluntary notoriety" and "access to the media" are the basic criteria for the public figure status. *Gertz, supra*, at 343-345. The findings of both Courts in the case at

bar stated that Mr. Lambert was subject to the *New York Times* rule, *supra*, because he was charged with a murder emphasizes the need for still further clarification by the Court. Furthermore, the distinction the *Gertz, supra*, Court makes between public and private Plaintiffs seems to increase the danger of self-censorship, precisely what the Court is trying to avoid. The reason the possibility of self-censorship is increased is because the former distinction between public and private issues, was an easier one for editors and broadcasters to make.

The District Court's decision to hold *Lambert, supra*, to the *New York Times, supra*, standard of proving actual malice highlights another confusing area of the *Gertz* decision, *supra*, the question of damages. The language of the *Gertz*, court, *supra*, reads "the States may not permit recovery of presumed or punitive damages . . . when liability is not based on a sharing of knowledge of falsity or reckless disregard for truth" *Gertz, supra*, at 349. Under this holding it is unclear whether states could establish two standards of liability; one based on "negligence" which would limit the Plaintiff to recovery of actually proven damages, a second based on knowing falsity or reckless disregard by the Defendant permitting presumed or punitive damages.

CONCLUSION

This Court should grant certiorari to correct clear procedural error, as well as to clarify the case law and concomitantly the status of libel actions in state courts.

Respectfully submitted,

RODERICK A.J. CAVANAGH
STEPHEN D. KEEFFE
Attorneys for Petitioner

OF COUNSEL:

KEEFFE BROTHERS
733 15th Street, N.W.
Washington, D.C. 20005

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 74-1287

GEORGE J. LAMBERT,
Plaintiff-Appellant,

v.

PROVIDENCE JOURNAL COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

Before Coffin, *Chief Judge,*
McEntee and Campbell, *Circuit Judges*

Roderick A.J. Cavanagh for appellant.
Knight Edwards, with whom *Edward F. Hindle, Terrence M. Finn,* and *Edwards & Angeli* were on brief, for appellee.

January 7, 1975

McEntee, *Circuit Judge.* Plaintiff George J. Lambert owned and operated the Camelot Inn, a cafe in Fall River, Massachusetts. On October 6, 1972, at the Inn he shot and killed one Thomas F. McCabe. As a result of this incident,

described more fully in the newspaper accounts in notes 1-4 *infra*, Lambert was charged as an accessory after the fact to murder, and later with murder itself. The charge was reduced to manslaughter, however, at a bindover hearing. Lambert was tried in the Massachusetts Superior Court for Bristol County and was acquitted.

During the period before trial the defendant, the Providence Journal Company, published four articles concerning Lambert dated October 8,[1] October

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[1] "Pair Deny Murder, Accessory Charges – 2 Men held in Fatal Fall River Shooting

"Two Fall River men were arrested by police early yesterday morning and charged in connection with the murder shortly before midnight Friday of a 28-year-old Fall River man in the Camelot Inn on South Main Street.

"Edward Smialek, 55, who lives above the Inn at 427 South Main St., pleaded innocent to a charge of murder before Judge Hugh Morton in District Court yesterday afternoon.

"The manager of the Camelot Inn, George J. Lambert, 28, of 746 King Philip St., pleaded innocent to a charge of being an accessory after the fact of murder. Both cases were continued to Wednesday.

"The charges stem from the shooting death of Thomas F. McCabe, Jr., 28, of 288 Lincoln Avenue, Fall River, who was vice president and one of the owners of the Cellar Door Cafe on Davol Street. His murder was the ninth in Fall River this year.

"Detectives from the Criminal Investigation Division said Smialek and Lambert were arrested about 5 a.m. yesterday inside the Camelot Inn. The two had remained there after the shooting while police conducted their investigation.

"Smialek is being held at Bristol County House of Correction without bail and Lambert, who is represented by his brother, Jay Lambert, an attorney, was released on $10,000 bail.

"Police confirmed that the murder occurred shortly before midnight Friday when Mr. McCabe and three friends entered the Camelot Inn and were told to leave by the management because they were not wearing jackets or ties. . . ."

13,[2] and December 28, 1972[3] and February 18, 1973,[4] which is distributed in Massachusetts and Rhode Island.

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[2] "Court Action Taken Against 4 In Three Fall River Murders

"Court developments in three of the city's homicide cases were recorded yesterday in Fall River.

* * *

"In district court, George J. Lambert, 28, of 746 King Phillip St., proprietor of the Camelot Inn on South Main Street, Fall River, was arraigned on a charge of murder in connection with the fatal shooting of Thomas F. McCabe, Jr., 28, of 288 Lincoln Avenue, Oct. 6, at the inn.

"Also charged with homicide resulting from the same shooting is Edward J. Smialek 55, of 427 S. Main St.

"He was arrainged last Tuesday on a charge of being an accessory after the fact to the same murder, a count that remains against him.

"Yesterday after Lambert pleaded innocent to murder, Judge Milton R. Silva ordered him committed to the New Bedford House of Correction on $25,000 bail. Surety in that amount was posted for him yesterday afternoon and he was released. . . ."

[3] "Fall River Cafes Beginning to See the Light"

". . . The board's swift and decisive action has set it at loggerheads in at least one instance with the state Alcoholic Beverage Commission.

"The ABC recently overruled the indefinite suspension of a liquor license at Camelot Inn, 425 S. Main St., contending that the board exceeded its authority. The ABC returned the license pending a court hearing on an October murder charge brought against the cafe owner, George Lambert.

"The incident is illustrative of what the licensing board has been up against. The murder victim, Thomas F. McCabe was the owner of Cellar Door Cafe, 1082 Davol St., which lost its license in September for 'general mismanagement,' including alleged drug-trafficking, having minors on the premises and violating fire codes. . . ."

[4] Homicide – 13 Murder Cases Scheduled For Trial Next Month in Bristol Cty."

(continued)

Alleging the articles were defamatory,[5] Lambert sued the Journal in the District Court for the District of Rhode Island. The Journal filed a motion for summary judgment, together with supporting affidavits, Lambert's deposition, and a memorandum of law. Lambert filed an objection to the motion, together with supporting affidavits, depositions, and a memorandum of law. The court granted the

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[4] (continued)

"Thirteen Bristol County murder cases have been scheduled for trial next month during the special three week Superior Court session requested by District Attorney Philip Rollins.

* * *

"The 28-year-old vice president and part owner of the Cellar Door, a bar on Davol Street, is the fourth Fall River murder victim whose case will go to Superior Court.

"Thomas F. McCabe, Jr., 28, of 288 Lincoln Ave., was shot to death inside the Camelot Inn on South Main Street shortly before midnight on Oct. 6.

"Arrested first as an accessory and later for the actual murder is the Camelot Inn's then manager, George J. Lambert, 28, of 746 King Philip St.

"Police reports indicated Mr. McCabe and three friends entered the Inn and immediately were told to leave because of a rule demanding ties and jackets. A fight ensued and Mr. McCabe was shot, staggered to the outside door and collapsed. . . ."

[5] The innuendo actually pleaded, that each article was understood to mean that "a 'murder' had been committed and that Plaintiff was charged with the criminal conduct aforesaid," seems deficient as a matter of law. The latter imputation would be defamatory but was admittedly true; the former is false but not defamatory as to Lambert because it does not imply his involvement. *Riverhouse Pub. Co. v Porter,* 287 F.Supp. 1, 3-5 (D. R.I. 1968); *Hanson v. Globe Newspaper Co.,* 159 Mass. 293, 294-95, 34 N.E. 462, 462-63 (1893). The essence of Lambert's claim is that the articles were understood to mean that he had committed murder, and we treat it as such throughout our opinion.

motion on the alternative grounds that the allegedly libellous material was not defamatory since the innuendo pleaded by Lambert was unwarranted, and that even if the material were actionable Lambert failed to demonstrate that there was a genuine issue of fact as to the Journal's actual malice under the standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Lambert appeals. We find it unnecessary to reach the court's second ground of decision, as we agree that none of the articles was reasonably capable of any defamatory meaning.

Lambert cannot object to the articles insofar as they report, admittedly truthfully, that he was *charged* with murder. "The publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true . . . . But if to this fact there is added, by way of comment, words which amount to an accusation that the charge is true, or comment which assumes the guilt of the person arrested, by headlines or otherwise, the mere fact that the person was arrested upon the charge stated is no justification for words imputing guilt." *Commercial Pub. Co. v. Smith*, 149 F. 704, 706 (6th Cir. 1907); *Thompson v. Globe Newspaper Co.*, 279 Mass. 176, 188, 181 N.E. 249 (1932). Lambert claims that the articles' characterization of McCabe as a murder victim and the incident itself as a murder with that term's denotation of illegality, instead of the neutral "shooting death," "homicide", or "killing," constituted such editorial comment imputing guilt. In support of his construction Lambert submitted the depositions of three community residents who testified that such had been their "fair," "plain," and "ordinary" understanding of the articles in question.

It is for the court to decide whether a statement can be defamatory in character. *Andoscia v. Coady*, 99 R.I.

731, 735, 210 A.2d 581, 584 (1965); *Sharratt v. Housing Innovations, Inc.*, 1974 Mass. Adv.Sh. 575, 577-78, 310 N.E.2d 343, 345.[6] Reading the articles in their entirety, *Bray v. Providence Journal Co.*, 101 R.I. 111, 116, 220 A.2d 531, 534, W. Prosser, Torts §111 at 747-48 (4th ed. 1971), and construing their language naturally, *Reid v. Providence Journal Co.*, 20 R.I. 120, 122, 37 A. 637, 637 (1897), *Lyman v. New England Pub. Co.*, 286 Mass. 258, 261, 190 N.E. 542, 543 (1934), we are constrained to agree with the district court that none was reasonably capable of conveying the defamatory meaning Lambert alleges. *Bray v. Providence Journal Co., supra; Sharratt v. Housing Innovations, Inc., supra* at 578, 310 N.E.2d at 345. Even if the use of the term "murder" implied that the killing was unlawful, each article unequivocally states that Lambert has "denied" the murder charge or "pleaded innocent," or reports the progress of the case in such a way as to make clear that no determination of his involvement has been made. Nothing in them suggests that the Journal has concluded that Lambert is the guilty party even if it has decided that there was a murder.[7] Moreover,

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[6] The district court applied Rhode Island's law of libel in this case. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Since Massachusetts law does not differ in any significant respect as our twin citations throughout will show, we need not consider whether that state has a more significant relationship to the occurrence and the parties. *See* Restatement (Second) of Conflict of Laws §150 (1971).

[7] This differentiates the instant case from *Commercial Pub. Co. v. Smith, supra.* In that case the court held it was a jury question whether the following article was defamatory:

"Murderer Arrested.

Augusta, Ark., Feb. 10th. – Sheriff Marshal Patterson arrested Fred Smith, camped in a tent ten miles north of Augusta, on White river. Smith is wanted at Kennett, Mo., for

(continued)

the term "murder" is used interchangeably throughout with the terms "fatal shooting," "shooting death," and "homicide," often in the same or adjacent sentences. In this context the term clearly is chosen solely for variety's sake and merely echoes the report of the charges levelled against Lambert without implying their truthfulness. It is obviously to be understood as "alleged murder." In these routine news articles we think it would require more forceful language than this to justify Lambert's reading.[8] The innuendo cannot be used to enlarge the natural meaning of the words actually used. *Ogrodnick v. Providence Journal Co.*, 93 R.I. 316, 317, 175 A.2d 289, 291 (1961); *Colby Haberdashers, Inc. v. Broadstreet Co.*, 267 Mass. 166, 170, 166 N.E. 550, 551 (1929). None of these articles can be construed to impute guilt without such an enlargement.

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[7] (continued)
killing old man F.E. Porch, the incentive being robbery. The state of Missouri offered $300, the county $200, and the citizens of Malden $600, for Smith's arrest. Smith does not deny being the man wanted, but claims he did not do the killing."

Describing the plaintiff as a murderer implicated him in the killing in a way the Journal's articles did not implicate Lambert here. "Other cases, though persuasive, are rarely controlling [in libel actions] because of variations in the words used." *Lane v. The Washington Daily News*, 85 F.2d 822, 824 (D.C. Cir. 1936). Moreover, *Smith* was decided nearly seventy years ago under federal common law. The trend has shifted towards restricting liability for defamation, W. Prosser, *supra* at 738-39, and we doubt the *Smith* result would be reached under present-day Massachusetts and Rhode Island libel law.

[8] The context shows that the single use of the phrase "actual murder" in the last article served to distinguish the murder charge from the earlier accessory charge and could not be read to assert the conclusion that the killing was unlawful.

Finding the meaning of the articles clear, we see no basis on which the depositions of witnesses could be held competent as to their defamatory capacities. *Snell v. Snow*, 54 Mass. (13 Metc.) 278 (1847); *Duncan v. Pearson*, 135 F.2d 147 (4th Cir. 1943). To the ordinary reasons advanced for excluding such testimony may be added the difficulty, evidenced by the depositions here, of distinguishing between "murder" and "killing" – a distinction vital to Lambert's case. Such considerations explain the courts' reluctance to entertain libel suits dependent upon a precise construction of a newspaper's use of technical legal terminology. *Bray v. Providence Journal Co., supra* ("testimony"). *Joyce v. Globe Newspaper Co.*, 355 Mass. 492, 245 N.E.2d 822 (1969) ("commitment"); *Piracci v. Hearst Corp.*, 263 F.Supp. 511 (D. Md. 1966). Despite the Journal's loose use of the word "murder," we think only "supersensitive persons, with morbid imaginations," *Reid v. Providence Journal Co., supra* at 122, 37 A. at 637, could discover in any of these articles the assertion that Lambert was guilty of murder.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1287.

GEORGE J. LAMBERT,
Plaintiff, Appellant,

v.

PROVIDENCE, JOURNAL COMPANY,
Defendant, Appellee.

JUDGMENT

Entered January 7, 1975

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup

Clerk.

[cc: Messrs. Cavanagh and Hindle.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

George J. Lambert	)	
	)	
v.	)	C.A. No. 5335
	)	
Providence Journal Company	)	

Opinion

Pettine, Chief Judge

The defendant's motion for summary judgment pursuant to Rule 56 Fed. R. Civ. P. reasons that the alleged libelous articles which it published giving rise to this federal diversity action are not defamatory; and further the depositions and affidavits[1] filed in support of this motion negate any proof of the required actual malice which is necessary to support the plaintiff's action since the subject matter was one of public interest.

The plaintiff is a citizen of Massachusetts and the defendant is a corporation incorporated under the laws of the State of Rhode Island with its principal place of business in the City of Providence. Its circulation covers the State of Rhode Island extending into the Commonwealth of Massachusetts. The amount in controversy exceeds $10,000. 28 U.S.C. sec. 1332.

Findings of Fact

Four publications are the subject of this litigation. These appeared in the defendant's newspapers published October 8, 13, 1972, December 28, 1972, and February 18, 1973.

On October 8, 1972 the defendant published a news item[2] headlined, "Pair Deny Murder Accessory Charges. 2 Men Held in Fall River Shooting." In general the story concerned the fatal shooting of a man in an inn managed by the plaintiff and the action taken by the police. It stated

> "Two Fall River men were arrested by police early yesterday morning and charged in connection with the murder shortly before midnight Friday of a 28 year old Fall River man in the Camelot Inn on South Main Street. . . ."

The specific portions of the story complained of read:–

> "The manager of the Camelot Inn, George J. Lambert, 28, of 746 King Phillip St. pleaded innocent to a charge of being *an accessory after the fact of murder* . . . .
>
> The charges stem from the shooting death of Thomas F. McCabe, Jr., 28, of 288 Lincoln Avenue, Fall River, who was vice president and one of the owners of the Cellar Door Cafe on Davol Street. His *murder* was the ninth in Fall River this year . . .
>
> Police confirmed that the *murder* occurred shortly before midnight Friday . . . . (emphasis added).

The plaintiff, who was subsequently acquitted, contends that this article accuses, "the plaintiff of a commission of a crime. . . . [and that the subscribers of said newspaper] generally understood [the article] to have the sense and meaning that a 'murder' had been committed and that the plaintiff was charged with the criminal conduct aforesaid".

On October 13, 1972 the portion of the published story[3] pleaded by the plaintiff as defamatory reads –

> "Court Action Taken Against 4 In Three Fall River Murders.
>
> In district court, George J. Lambert, 28, of 746 King Phillip Street, proprietor of the Camelot Inn on South Main Street, Fall River, was arraigned on a charge of murder in connection with the fatal shooting of Thomas F. McCabe, Jr., 28, of 288 Lincoln Avenue, October 6, at the inn.
>
> He was arraigned last Tuesday on a charge of being an accessory after the fact *to the same murder*, a count that remains against him."

As to this article the plaintiff contends it was generally understood by the readers ". . . to have the sense and meaning that a 'murder' had been committed and that the plaintiff was charged with the criminal conduct aforesaid".

On December 28, 1972 the published story[4] focused on the activities of the Fall River licensing commissioners in stringently enforcing all regulations and liquor licensing provisions. In relating the various actions it had taken against establishments a part of the story reads –

> "The ABC recently overruled the indefinite suspension of a liquor license at Camelot Inn, 425 South Main Street, contending the board exceeded its authority. The ABC returned the license pending a court hearing on an October murder charge brought against the cafe owner, George Lambert. The incident is illustrative of what the licensing board has been

> up against. *The murder victim,* Thomas F. McCabe was the owner of Cellar Door Cafe. . . ."

Here the plaintiff urges that this article has ". . . the sense and meaning that a murder had been committed at the Camelot Inn and that plaintiff was charged with the criminal conduct aforesaid." He presents the same position as to the fourth article published February 18, 1973[5] which stated that thirteen Bristol County murder cases had been scheduled for trial. In discussing each it read as to the plaintiff:

> "The 28 year old vice president and part owner of the Cellar Door, a bar on Davol Street, is the fourth Fall River murder victim whose case will go to Superior Court.
>
> Thomas F. McCabe, Jr., 28, of 288 Lincoln Avenue, was shot to death inside the Camelot Inn on South Main Street shortly before midnight on October 6.
>
> Arrested first as an accessory and later for the actual murder is the Camelot Inn's then manager George J. Lambert, 28, of 746 King Phillip Street."

It is the opinion of this court that the four articles in question describing the shooting and death were accurate reflections of the incident and in no way stated that the plaintiff had committed murder. Support for this finding is irradicably impressed within the plaintiff's deposition taken on February 26, 1974,[6] and no cause of action exists unless the innuendo alleged by the plaintiff is warranted. He argues the court is ". . . confronted with a question of material fact. . . . as to what was a fair reading of

the articles giving the words in those articles their plain and ordinary meaning . . . [and] submit[s] [it] is [a] question for the trier of fact, i.e. the jury."

Applying Rhode Island state law under the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), 58 S.Ct. 817 it is firm decisional law that ". . . where the language complained of is plain and unambiguous it is for the court to say whether or not it is slanderous". *Della Posta v. Rand Express Freight Lines*, 86 R.I. 148, 133 A2d 775 (1957). More explicitly the Rhode Island Supreme Court stated in *Andoscia v. Coady*, 99 R.I. 731, 210 A2d 581 (1965),

> "In short, we subscribe to the view stated in Reid v. Providence Journal Co., supra 20 R.I. at page 122, 37A at page 637: '*** if the language is not reasonably capable of conveying to the ordinary mind the defamatory meaning alleged in the innuendo, it is the province and duty of the court to so declare, and to deny the right to maintain an action thereon.' The view that the basic question of whether a publication is defamatory in character is for the court is well settled. (citations omitted)" See also *Harkaway v. Boston Herald Traveler Corporation* 418 F2d 56 (1st Cir. 1969); *Gariepy v. Pearson* 104 F.Supp. 681 (DC 1952), Rev'd 207 F2d 15 (DC Cir. 1953), cert denied 346 U.S. 909, 74 S.Ct. 24 (1953).

The plaintiff contends he was defamed because the articles accuse him of a commission of a crime in that the stories had the "sense and meaning" a murder had been committed for which he had been charged.

To this court the reasonable and usual meaning of the words used in the publications at issue are not capable of any defamatory meaning. In light of the correct reporting of the facts I cannot read in the words used any meaning that the plaintiff was charged with any criminal conduct in addition to those actually lodged against him by the authorities. To do so would require insertion of new matter which is beyond the permissible use of an innuendo.

> "The purpose of an innuendo is to define the defamatory meaning of words which may be equivocal, but it cannot be used to introduce new matter or to enlarge the meaning of words or give language a construction it will not bear. . . ." *Bray v. Providence Journal Co.*, 101 R.I. 111 (1966) at 115.

As this court stated in *Riverhouse Publishing Company v. Porter*, 287 F. Supp. 1 (D.R.I. 1968) at page 4, the only function of the innuendo is ". . . to explain the meaning of words and apply them in light of other averments in the declaration. It cannot introduce new matter. . . ."[7]

As to the reasonable meaning of the articles, when read in their entirety, it cannot be more succinctly argued than as set forth in the defendant's brief quoted in the margin herein.[8]

The plaintiff offers the depositions of three individuals to support his position as to "the meaning of the articles after a fair reading of the same." I do not find these persuasive. It is the court's responsibility to initially evaluate the defamatory nature of a purported libelous publication, as it may reasonably be expected to convey the pleaded meaning of the innuendo, to an ordinary mind. In

making this determination, a court does not employ a purist approach to the meaning of words nor does it resort to serpentine cerebrations in drawing its conclusions.

Furthermore, even apart from all this the plaintiff is unable to establish that the defendant acted with knowledge that the articles were false or that the defendant acted with reckless disregard of their falsity.

This court pointed out in *McBurney, Jr. v. The Associated Press,* (CA No. 5174, D.R.I. March 29, 1974):

> "In *New York Times v. Sullivan,* 376 U.S. 254 (1964), . . . the United States Supreme Court enunciated the rule that:
>
> > 'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* at 289-280.'
>
> Subsequently the Times doctrine has been held to apply to public figures, *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), and to all utterances relating to 'an issue of public or general concern.' *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 44 (1971); *Casano v. WDSU-TV, Inc.,* 464 F.2d 3 (5th Cir. 1972); *Firestone v. Times, Inc.,* 460 F.2d 712 (5th Cir.), cert. denied, 409 U.S. 875 (1972). . . .
>
> Yet even a finding by this Court that the publication contained false information is insufficient to establish defendants' liability, and alone

presents no triable issue of fact for the jury. As stated in *St. Amant v. Thompson*, 390 U.S. 727 (1968):

> '. . . to insure the ascertainment and publication of the truth about public affairs it is essential that the First Amendment protect some erroneous publications as well as true ones.' *Id.* at 732.

See *Garrison v. Louisiana*, 279 U.S. 64, 74-75 (1964);

> Nor is proof of the failure of defendants to use ordinary and reasonable care in gathering the facts and publishing a news story sufficient to establish liability for a false publication. 'These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice.' *St. Amant v. Thompson, supra*, at 731."

The plaintiff recognizes this law but argues the cases articulating this rule involved individuals "caught up in some particular movement of great social effect affecting a broad range of individuals", and that it is a jury fact question whether the incident in question is of great public concern.

Rosenbloom v. Metromedia, Inc., supra, resolves this precise issue. In this case the plaintiff, a distributor of nudist magazines, brought a civil libel action because of news

stories about police action against his allegedly obscene books. Some of the news stories referred to "girlie book peddlers" and the "smut literature racket". After being acquitted of criminal obscenity charges, the plaintiff brought the civil action.

Justice Brennan writing for a plurality of the Court held that the New York Times' knowing or reckless falsity standard applies not only to civil libel actions brought by a "public official" or a "public figure" but also in a libel suit "by a private individual for a defamatory falsehood uttered in a news broadcast about the individual's involvement in an event of public or general interest" 403 U.S. at 32-33. Justice Black in a concurring opinion stated his position more broadly reiterating his long espoused belief that the First Amendment gives news media total immunity from libel actions. Justice Douglas, another consistent advocate of the absolute immunity view, did not participate. Finally, Justice White took a more restrictive view of the scope of the *New York Times* rule in these situations, but a view which would allow the application of the *New York Times* standard in the case at bar. He concluded that "absent actual malice as defined in *New York Times Co. v. Sullivan*, the First Amendment gives the press . . . a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." 403 U.S. at 62. Therefore, it is clear that even excluding Justice White, a majority of the court holds that private individuals involved in an area of legitimate public interest are subject to the libel standards set forth in *New York Times* as well as public officers and public figures.

Justice Brennan stated:

> "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest both in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." 403 U.S. at 43-44.

Afortiori one hardly need discuss the notorious nature of a shooting death followed by an arrest and indictment

and the public's interest in the enforcement of the criminal laws.

As in *Rosenbloom*, this court does not reach the "delineation of the reach [of what incidents are of public or general concern] . . . since the police arrest of a person [for the shooting death of an individual] clearly constitutes an issue of public or general interest."

Viewing the declaration and the depositions in this case in the light most favorable to the plaintiff and mindful that a litigant has a right to trial where there is even the slightest doubt as to the facts, I am constrained to grant the defendant's motion for summary judgment.

> "The function of the summary judgment is to avoid a useless trial; and *a trial is* not only not useless but *absolutely necessary where there is a genuine issue as to any material fact.*
>
> In ruling on a motion for summary judgment *the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues; to deny summary judgment where there is a genuine issue as to any material fact;* and to grant summary judgment, if at all, where there is no such issue and on the substantive law the movant is entitled to judgment. [citations omitted]" emphasis added.
>
> 6 Moore, Federal Practice Sec. 56.15 [1.-0].

Extending this to First Amendment cases such as the one at issue, this court in *McBurney, supra*, quoted from *Medina v. Time, Inc.*, 319 F. Supp. 398 (D.C. Mass., 1970), aff'd, 439 F.2d 1120 (1st Cir. 1971).

> " 'defendant therefore should be entitled to summary judgment under Rule 56 unless there is a showing by plaintiff that there is a genuine issue of fact as to defendant's lack of actual malice. This is especially true in a case of this type where the protection of defendant's first amendment right to freedom of the press requires that defendant be protected not only from judgments for damages but also from the chilling effect of being required to defend a libel suit in which plaintiff's case makes no showing of any reasonable likelihood of being able to establish factually the existence of actual malice.' 319 F. Supp. at 400."

Here there is no evidence to support actual malice; "There must be proof of actual knowledge of the falsity of the publication, or, at least, proof that the defendant actually entertained serious doubt as to its truth," *McBurney v. The Associated Press, supra;* no specific facts are set forth supporting the plaintiff's allegations of the articles' falsity or the defendant's reckless disregard for their truth or falsity. The deposition he offers merely sets forth the plaintiff's complaint to the defendant as to the news coverage, including certain police stating they never characterized the event as murder, the plaintiff's version to defendant he acted in self defense and that no one had been convicted of murder.[9] These contentions are of no significance and in no way meet the standards of the decisional law discussed *supra.* I do not find that any reading of the articles support an interpretation that anyone had been convicted of murder. Any innuendo to that effect I find would be unwarranted.

In conclusion it appears to me the after effects of *Rosenbloom* may well have the practical effect of affirming Justice Black's total immunity theory for the news media. After all, what incident covered by the news media is not or does not become an event of public interest? Few will not qualify. Indeed, why is a court better equipped than the professional news media to define the parameters of what events involve public or general interest? In the reality of recognizing that publication generates public interest, the application of present law appears to me to impress upon the court, in the face of a libel suit, the right to determine whether in the first instance the news media should have released the story. I find this well beyond the court's expertise and an unconsitutional impingement on the freedom of the press.

The problem is complex and is already pregnant with a plurality of opinions from the Justices. In the crucible of trial courts, through cases that offer the necessary subtleties, it will be determined whether, as a practical matter, *Rosenbloom* affirms Justice Black's theory of absolute immunity leaving open perhaps only the outer limits of the constitutional protection of privacy.

In this case the subject matter does not lend itself to discussions of these issues.

The defendant's motion for summary judgment is granted. An order will be prepared accordingly.

/s/ RAYMOND J. PETTINE
Raymond J. Pattine
Chief Judge

June 15, 1974

Footnotes

1. EDWARD J. SULLIVAN, being duly sworn, deposes and says:

1. I am employed by the Providence Journal Company ("Journal") and have been for a period of more than twenty years. I began my employment with the Journal in 1948 and continued working for them until 1965. At the time I left the Journal in 1965 I was Bureau Chief of the Fall River office of the Journal. From 1965 to 1970 I was the Director of the Federal Poverty Program for the City of Fall River. From July, 1970 to the present time I have been working for the Journal as the Bureau Chief of the Fall River office.

2. I was responsible for writing the article which appeared in the Journal on October 13, 1972, and which is designated as Exhibit B to plaintiff's complaint in the above-captioned matter. The article reports court action that was taken with respect to three incidents, each involving a murder charge. I received my information for the article from telephone calls I made to the Clerk of the Court for the Second District Court of Bristol County, Massachusetts, and to the Clerk of the Court for Bristol County Superior Court.

3. As a matter of background to the article of October 13, 1972, and other articles about the Lambert case, I would state that this incident was a matter of particular or special public interest and concern, because of the unusual number of killings that had occurred since January, 1972, in Fall River and, further, because of the downtown locus of the incident and the prominence of the victim's family in the community. Further, we feel it was a matter of general public interest to see that any actions taken with respect to all alleged crimes of this nature were covered thoroughly in the newspaper.

4. At the time I wrote this article I did not know George Lambert personally and bore him no ill-will.

5. Subsequent to the writing of the October 13, 1972, article I did meet Mr. Lambert, sometime in late October or early November, 1972. Mr. Lambert was introduced to me by one Thomas Silvia. Mr. Lambert complained to me that he felt our coverage of the incident in which he was involved was unfair. At that time I told Mr. Lambert that our policy was not to report out-of-court versions of any alleged crimes until there had been a disposition by court proceedings. That is, I explained to him that it was against our policy to try cases in the newspaper.

6. I have found in the past that both the above-mentioned Clerks of Court have been completely reliable as far as giving information concerning the disposition of cases. Thus, I entertained no doubts as to the truthfulness of the article I wrote. My primary concern was reporting events of public interest in a manner consistent with the standards of the journalism professions.

ARNOLD B. AJELLO, being duly sworn, deposes and says:

1. I am a state staff reporter for the Providence Journal Company ("Journal"), and I have been employed by the Fournal for five years beginning in July, 1969. I graduated from Bucknell University with a Bachelor of Arts in English in 1965. After graduation I reported for the Mooresville Times in Indiana.

2. I wrote the article which appeared in the December 28, 1972, Massachusetts edition of the Journal which is appended to plaintiff's complaint as Exhibit C. At that time I was working in the Fall River office of the Journal.

3. I wrote the article on the evening of December 27, 1972. I had been assigned by Edward J. Sullivan, the Journal Bureau Chief for Fall River, to cover a meeting of the Fall River Licensing Board. The meeting was of particular interest because of recent actions

by the Board enforcing liquor license regulations and punishing violators. After the meeting adjourned, I spoke to the three members of the Licensing Board. I asked them for examples of their 'get tough" policy vis-a-vis license violations. It is my recollection that the members cited the suspension of the liquor license for the Camelot Inn owned by George J. Lambert as an example. I wrote the article appearing in the December 28, 1972, Massachusetts edition of the Journal from the information I gathered speaking to the Licensing Board members and referring to our office "clip" file for further information.

4. At the time this article was written I did not know George Lambert personally, I do not know him personally now, and I have never borne any ill-will or malice towards him.

5. I entertained no doubts as to the truthfulness of the information I used in writing my article. I have found the Licensing Board members and our "clip" files to be reliable sources of information. My only interest in writing this article was to carry out my responsibilities as a journalist.

BRUCE BUTTERFIELD, being duly sworn, deposes and says:

1. I have been and am now working for the Providence Journal Company ("Journal") as a state staff reporter and have been since June, 1971. I graduated from Suffolk University with a Bachelor of Science degree in Journalism in January, 1970. Prior to working for the Journal I worked for the New Bedford Standard Times and the Patriot-Ledger (Quincy, Massachusetts).

2. I wrote the article dated October 8, 1972, which is designated as Exhibit A to the plaintiff's complaint. My standard practice would be to go to the Fall River Police Station at the beginning of my working day and check police logs for events of the past twenty-four

hours. I would then, as necessary, check with police detectives for any details concerning police activities and with the appropriate clerks of the courts to confirm any court action. To the best of my knowledge, on the night of October , 1972, I telephoned the Clerk of the Second District Court, or his assistant to confirm police charges and court action in the Lambert case as previously reported in local newspapers. Further, I talked to an individual police detective. I have found individual police detectives and the court clerks in Fall River to be reliable sources of information.

3. I wrote the article appearing in the Journal dated February 18, 1973, which is designated as Exhibit D to the plaintiff's complaint. My source for the information was District Attorney Rollins with whom I spoke and our office clip file at the Journal's Fall River Bureau. I have found District Attorney Rollins and our clip file to be reliable sources of information.

4. I had no doubts as to the truthfulness of either of the articles which I wrote.

5. At the time I wrote the articles I did not know George Lambert personally and bore him no ill-will or malice. My interest in writing these articles is to perform my duties as a journalist.

2. A-16. The Providence Sunday Journal, October 8, 1972.

A—16 The Providence Sunday Journal, October 8, 1972

Pair Deny Murder, Accessory Charges

2 Men Held in Fatal Fall River Shooting

Two Fall River men were arrested by police early yesterday morning and charged in connection with the murder shortly before midnight Friday of a 28-year-old Fall River man in the Camelot Inn on South Main Street.

Edward Smialek, 55, who lives above the Inn at 727 South Main St., pleaded innocent to a charge of murder before Judge Hugh Morton in District Court yesterday afternoon.

The manager of the Camelot Inn, George J. Lambert, 23, of 703 King Philip St., pleaded innocent to a charge of being an accessory after the fact of murder. Both cases were continued to Wednesday.

The charges stem from the shooting death of Thomas F. McCabe Jr., 28, of 203 Lincoln Avenue, Fall River, who was vice president and one of the owners of the Cellar Door Cafe on Davol Street. His murder was the ninth in Fall River this year.

Detectives from the Criminal Investigation Division said Smialek and Lambert were arrested about 5 a.m. yesterday inside the Camelot Inn. The two had remained there after the shooting while police conducted their investigation.

Smialek is being held at Bristol County House of Correction without bail and Lambert, who is represented by his brother, Jay Lambert, an attorney, was released on $10,000 bail.

Police confirmed that the murder occurred shortly before midnight Friday when Mr. McCabe and three friends entered the Camelot Inn and were told to leave by the management because they were not wearing jackets or ties.

A fight then reportedly broke out over the order that the four leave the inn and a few minutes later a shot was fired. Mr. McCabe staggered from just inside the door of the inn to an outer hallway and collapsed, police said.

He was pronounced dead at St. Anne's Hospital. Dr. Gordon B. Robbins, medical examiner, said after an autopsy yesterday that Mr. McCabe was shot through the heart.

Fall River detectives investigating the case refused to release any further information. The three persons with Mr. McCabe at the time of the fight and shooting were not identified.

Mr. McCabe's Cellar Door Cafe was recently closed by the licensing board for "general mismanagement."

Several shooting incidents and a murder in a cafe had led to a crackdown by the city on drinking establishments in the city.

Before the Cellar Door was closed, vandals smashed bottles and broke tables in the cafe after it was shut down for the night on Sept. 22.

The Cellar Door was opened as a place for younger men and women in Fall River and was licensed only last August.

Prior to the opening, Mr. McCabe worked with contractors in the Fall River area as a stone mason. The captain of the first football team at Bishop Stang High School, Mr. McCabe also played semi-professional football in New England for a short time.

He is to be buried tomorrow at Oak Grove Cemetery with his father, Thomas F. McCabe, who died Thursday after a long illness.

Providence Journal - October 13, 1972

3.

Court Action Taken Against 4 In Three Fall River Murders

Court developments in three of the city's homicide cases were recorded yesterday in Fall River.

In Superior Court, Raymond Laurianno, 20, of 454 Birch St., Fall River, pleaded innocent when arraigned on a murder indictment returned by the grand jury last week.

Judge Frank E. Smith ordered that he be held at the New Bedford House of Correction without bail and that he be examined by a psychiatrist within the next 20 days. Thirty days for special pleas also was allowed by the judge on petition of Laurianno's attorney, James L. O'Neil of Providence.

The defendant is accused of the fatal shooting David F. Carey, 22, of 20 Reuben St. in a Sunset Hill apartment Aug. 26.

Also pleading innocent to murder before Judge Smith yesterday was Charles Pimental, 23, of 155 Cottage St. Represented by assigned counsel, George T. Bolger of Fall River, he was ordered held at the Dartmouth Jail without bail. The court also ordered that he receive a psychiatric examination.

He is charged with the stabbing death of Robert E. Pichette, 22, of 29 Melrose St., Fall River, Sept. 11.

In district court, George J. Lambert, 23, of 746 King Philip St., proprietor of the Camelot Inn on South Main Street, Fall River, was arraigned on a charge of murder in connection with the fatal shooting of Thomas F. McCabe Jr., 23, of 203 Lincoln Avenue, Oct. 6, at the inn.

Also charged with homicide resulting from the same shooting is Edward J. Smialek, 55, of 427 S. Main St.

He was arraigned last Tuesday on a charge of being an accessory after the fact to the same murder, a count that remains against him.

Yesterday after Lambert pleaded innocent to murder, Judge Milton R. Silva ordered him committed to the New Bedford House of Correction on $25,000 bail. Surety in that amount was posted for him yesterday afternoon and he was released.

Also charged with homicide in the same case is Edward J. Smialek, 55, of 427 S. Main St. He pleaded innocent in district court last Tuesday and is free on $25,000 surety.

3. Providence Journal – October 13, 1972.

28a

4. Providence Journal December 28, 1972.

Fall River Cafes Beginning to See the Light

By ARNOLD B. AJELLO

If that dark corner where you used to cuddle up to your sweetheart in your favorite Fall River cafe is now free from the shadows, blame the city's licensing board.

The three commissioners, however, are out to squelch romance, not romance.

When appointed in January, they promised that as the streets cast muggings and the dark cafe corners [illegible] a tap on the head with a beer bottle or encourage a case of footwills.

In less than 12 months, a "terrific trip," as one commissioner calls the board [illegible] suspended liquor licenses, [illegible] laid-out numerous and [illegible] warnings, found scores of violations, visited as a group each of the city's 150 liquor establishments and pursuaded many of them to install bright lighting.

The verdict isn't in yet, but chairman Nathan J. Sokoletsky commented last night in a brief review of the board's hectic year, "At least we're doing our civic duty and I believe Fall River is a better place for it."

Besides the routine checks and review of applications for lodging houses, auto shops and restaurants, the commissioners must contend with reports on gaming, murder, prostitution and serving of minors at the cafes.

The board's swift and decisive action has set it at loggerheads in at least one instance with the state Alcoholic Beverage Commission.

The ABC recently overruled the indefinite suspension of a liquor license at Camelot Inn, 423 S. Main St., contending that the board exceeded its authority. The ABC returned the license pending a court hearing on an October murder charge brought against the cafe owner, George Lambert.

The incident is illustrative of what the licensing board has been up against. Thomas F. [illegible] was the owner of Peter Doer Cafe, 1021 David St., which lost its license in September for "general mismanagement," including alleged drug trafficking, having minors on the premises and violating fire codes.

Mr. Sokoletsky announced the board's intentions in January shortly after he and Commissioners Leo P. Smith and Manuel Ribeiro were appointed by Mayor Wilfred C. Driscoll. He said, "A license is a privilege and this board is not going to stand for any disregard of provisions of those licenses or the regulations which go with them. We are ready to go as far as the law will allow us in enforcement of those laws and regulations."

Though the ABC found the board had exceeded the law in the Camelot Inn case, Mr. Sokoletsky said earlier this month, "We did only what we thought was best for the city in closing the bar. We will continue to do what we think is right in the future and we may be overruled again."

Mr. Ribeiro said last night Mayor Wilfred C. Driscoll has not interfered with the board's decisions or its zealous inspection of cafes. The mayor advised the new appointees to get the job done, said Mr. Ribeiro, and has kept his distance since then.

The commissioners say the board has received excellent cooperation from the police department on cases which include a second shooting death, this one outside the Massasoit Cafe, 1004 Pleasant St., on charges of cafes harboring prostitutes who duck in off the corner for a quick drink to avoid patrolling detectives, of cafes allowing gaming activities and even an incident in which a bartender allegedly tested a bottle at a customer who asked for a snort just before closing time.

Pigeon's Cafe, 240 Pleasant St., has contributed to the commissioners' problems with reports of a man being shot and beaten there and of the bartender knocking a customer's head through the glass of a juke box.

Mr. Sokoletsky, 65, said last night in apparent understatement that in the last year, "I've learned a lot." He said the board has closed more bars in six months than previous licensing boards closed in five years.

Commissioner Smith, a 54-year-old telephone company employe with four children, said the job has offered the reward of contributing to the betterment of the community even though he has taken a bit of ribbing. "So many people I meet think this Christmas season is going to mean loads of free liquor." He adds, however, that none of the commissioners has accepted subtly-offered presents and they have resolutely declined to imbibe during an inspection of a cafe.

Mr. Ribeiro, 47, who works in the maintenance division of Hemingway Transport Inc. of East Providence, said the board conducts its investigations as a group "just because we don't trust each other but so that no one can say we acted alone in granting special exceptions."

The commissioners, who receive $1,500 annual salary—the chairman gets $750 more—claim to have caught more than two dozen unlicensed pool tables and juke boxes during their inspections.

Even general housekeeping is not beyond the board's scope. Pleasant Cafe, 1169 Pleasant St., was warned several months ago that it would not open in 1973 if exterior building improvements were incomplete and if it failed to get a new manager.

The board announced last night that the cafe has spruced up its facade and is awaiting for word from the state on the qualifications of a proposed manager.

Arthur S. Gaspar, president of the Fall River Package Stores Association, who has attended every licensing board meeting for the last three years, praised the commissioners last night as the "most active" he has known. "They're very fair," he said, adding that the board has helped project a better image of the liquor industry.

Homicide

13 Murder Cases Scheduled For Trial Next Month In Bristol Cty.

By BRUCE D. BUTTERFIELD

Thirteen Bristol County murder cases have been scheduled for trial next month during the special three week Superior Court session requested by District Attorney Philip Rollins.

Mr. Rollins said the backlog of murder cases in the county is one of the heaviest in history and includes several homicides not on the court docket for the March 5 session.

Five of those cases slated for trial are from Fall River and there are three others — Westport, Swansea and Attleboro cases — that involve Fall River residents.

In all, Fall River recorded nine murder cases in 1972 which the District Attorney's office cited as an unprecedented wave of slayings in the city. By comparison, there was only one murder in Fall River in 1971.

Police have failed to find suspects in two of the Fall River homicides and two others were prosecuted early last year.

Heading the list of the five remaining Fall River cases that will go either to trial or pleas during the March session is the murder April 16 of Stephen P. Cook, 16, of 45 Thomas St.

Charged with young Cook's stabbing death in that case are three Fall River residents. They are James Wampler, 18, and his brother, Wilton, both of 44 Harbor Terrace and Stephen Casmiro, 16, of 237 Sunset Hill.

Stephen Cook was stabbed four times by three assailants in a taxi cab on North Main Street across the street from the New England Telephone Company. Young Cook had hopped into the cab pleading for help after being chased from a B.M.C. Durfee High School function by his assailants.

In the second murder case from Fall River, a man and a woman are charged with killing 67-year-old Augustine Gonsalves of 1713 North Main St.

Mr. Gonsalves was robbed and beaten a few feet from his home on Sunday, May 28, while he was returning from a church feast celebration near his home.

Charged with the robbery-murder are Sharon Mederios, 19, of 151 E. Main St., Fall River and Thomas Almeida, 23, of 1453 Reed St., Somerset. Both turned themselves into police three days after the murder after warrants had been issued for their arrests.

The third murder in Fall River that will go to the March session is that of David Carey, 22, of 20 Reuben St. who was shot to death in a Sunset Hill apartment on Aug. 26.

Charged in that case is Raymond Lauriante, 20, of Fall River. During Carey's funeral at St. Patrick's Cemetery, 100 of his fellow Sidewinder Motor Cycle gang members drank wine and ended up throwing bullets on the youth's grave. They claimed it was a sign of respect for their dead comrade.

The 29-year-old Carey was president and part owner of the Cellar Door, a tavern on Davol Street. It is the fourth Fall River murder victim whose case will go to Superior Court.

Thomas F. McCabe Jr., 28, of 283 Lincoln Ave., was shot to death inside the Camelot Inn on South Main Street shortly before midnight on Oct. 6.

Arrested first as an accessory and later for the actual murder is the Camelot Inn's then manager, George J. Lambert, 25, of 746 King Philip St.

Police reports indicated Mr. McCabe and three friends entered the Inn and immediately were told to leave because of a rule demanding ties and jackets. A fight ensued and Mr. McCabe was shot, staggered to the outside door and collapsed.

Robert E. Pickette, 22, of 29 Melrose St., is the fifth homicide victim. He was stabbed to death outside the Pleasant Street Cafe on Sept. 11 after an argument with another man.

Charged with murder is Clarence Clements, 23, of 183 Pleasant St., Fall River. He was arrested six days after the stabbing.

According to witnesses, Mr. Pickette walked to a car outside the cafe and began arguing the slayings of eight Greater Boston women, involves a Fall River victim.

Miss Charlene Sustakowsky, 16, of Pleasant St., Fall River was found shot to death on an embankment along Route 88 in Westport on Dec. 23 — the same day she was murdered.

Charged in the case is Diana M. Dixon, 21, of 35 Codman Court, Dorchester, formerly of Fall River. Two juvenile girls are also charged in the case, although they have not been indicted and have turned states evidence.

The Attleboro case — which has been to trial once with a co-defendant — involves the murder of Joseph Dorgan, 24, of Providence who was allegedly dragged to Attleboro after a "drag Queen" party and shot through the head.

Gene B. Tremblay, 22, formerly of 113 Oregon St., Fall River, is charged with the killing. He would have been tried early last year with another co-defendant but had escaped from the New Bedford House of Correction and was still at-large during the trial.

At that first trial a Valley Falls man was found innocent of the murder. The trial was a parade of third world characters from Providence, many of whom are expected to be called again as witnesses.

The remaining five murder cases scheduled to be heard next month include cases from Norton, Taunton, Raynham and two from New Bedford.

The defendents and the victim in the Norton case are from Attleboro. Ralph Geary, 17, of Attleboro is charged with strangling Mrs. Nancy Cote, an Attleboro housewife, to death last September.

Mrs. Cote of 180 S. Main St., was found in a picnic grove off Route 123 at the Attleboro-Norton line. Her nude body was recovered by police after Geary reportedly turned himself into state police.

In the Taunton case, Mrs. Katherine [illegible], 40, of Assonet, is charged with stabbing her mother to death in East Taunton last October.

A Berkshire store owner was murdered in Raynham in October when two robbers held him up in the store. The victim was George Pierson, 65, of 116 Center St., Easton. Charged are Gilbert Dias and

6. The plaintiff admitted, as set forth in defendant's brief:

"1. In October, 1972, plaintiff was the proprietor of the Camelot Inn which was located at 425 South Main Street, Fall River, Massachusetts (Qs. 4 and 5);

2. On October 7, 1972, plaintiff was arrested by the Fall River police on a charge of being an accessory after the fact of murder (Qs. 6, 7, 29, 30 and 38);

3. Plaintiff was arrested on the accessory after the fact of murder charge at about five o'clock on the morning of October 7, 1972 (Qs. 39 and 47);

4. Thomas McCabe was the person killed whose death was the subject of the accessory after the fact of murder charge (Qs. 10 and 34);

5. Plaintiff was released on $10,000.00 bail after his arrest on the accessory after the fact of murder charge (Qs. 47-49);

6. Plaintiff pleaded innocent to the chage of being an accessory after the fact of murder (Qs. 13 and 31);

7. Plaintiff was arraigned on a charge of being an accessory after the fact of murder in the District Court (Second District, Bristol County, Massachusetts) (Qs. 11 and 12);

8. On October 11 or 12, 1972, plaintiff was arrested by Fall River police on a charge of murder in connection with the fatal shooting of Thomas McCabe (Q. 54);

9. Plaintiff was arraigned in district court on a charge of murder (Qs. 54, 60 and 61);

10. Plaintiff pleaded innocent to the charge of murder (Q. 69);

11. Plaintiff was released on $25,000.00 bail after pleading innocent to a charge of murder (Qs. 54 and 69);

12. Plaintiff was indicted on a charge of murder (Qs. 51, 86, 87 and 88); and

13. The Alcoholic Beverage Commission for the Commonwealth of Massachusetts reinstated plaintiff's liquor license, which had been suspended pending outcome of the murder charge brought against plaintiff (Qs. 63 and 64);"

7. *Reid v. Providence Journal Co.*, 20 R.I. 120 (1897); *Ogrodnick v. Providence Journal Co.*, 93 R.I. 316 (1961); *Connery v. Kalian*, 99 R.I. 60 (1964); *Bray v. Providence Journal Co.*, 101 R.I. 111 (1966); *Riverhouse Publishing Company v. Porter*. 287 F. Supp. 1 (D.C.R.I., 1968); *Colby Haberdashers, Inc. v. Bradstreet Co.*, 267 Mass., 166, (1929); *Lyman v. New England Newspaper Publishing Co.*, 286 Mass. 258 (1934); *Perry v. E. Anthony & Sons, Inc.*, 353 Mass. 112; *Joyce v. George W. Prescott Publishing Company*, 348 Mass., 790; *Brady v. Hearst Corporation*, 281 F. Supp. 637;

8. "To suggest that a reference to McCabe as a 'murder victim" can be read as meaning that a murder was committed or that plaintiff did it adds substantial new matter to the text of the writing. First, every article accurately and precisely sets forth plaintiff's involvement in the incident as he admitted it was at that particular point in time. Plaintiff "pleaded innocent to a charge of being an accessory after the fact of murder" (Exhibit "A" to the Complaint); "was arraigned on a charge of murder in connection with the fatal shooting" (Exhibit "B" to the Complaint); "The ABC returned the license pending hearing on an October murder charge brought against the cafe owner, George Lambert" (Exhibit "C" to the Complaint); "Arrested first as an accessory and later for the actual murder is . . . George J. Lambert" (Exhibit "D" to the Complaint). To conclude that plaintiff committed a murder requires a reader to extend and enlarge the meaning of "murder" to contradict express language at other places in the article.

To conclude that a murder, in the technical, legal sense of that term, had been committed requires an unreasonable reading of the articles. Given that both charges brought against plaintiff, either accessory after the fact of murder or murder, included the word "murder" in them, the use of "murder" elsewhere in the articles only serves to refer the reader to the charges stemming from the events being described. In discussing those charges, the articles always clearly state that plaintiff is only "charged", and not guilty of or even responsible for, the alleged criminal conduct.

9. Deposition of George J. Lambert, February 26, 1974.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1398

GEORGE J. LAMBERT,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KNIGHT EDWARDS
Attorney for Respondent

Of Counsel:
EDWARD F. HINDLE
TERRENCE M. FINN
EDWARDS & ANGELL
2700 Hospital Trust Tower
Providence, Rhode Island 02903

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OCTOBER TERM, 1974

No. 74-1398

GEORGE J. LAMBERT,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

The petition for certiorari presents questions (Petition at p. 2) that ignore the reasoning of the decision rendered in the United States Court of Appeals for the First Circuit (Petition Appendix A). The questions considered by the Court of Appeals in its opinion were (1) whether the articles in question were capable of a defamatory meaning *as a matter of state law,* (2) whether the standards set forth by this Court in *New York Times* v. *Sullivan,* 376

U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) applied, and (3) whether there was an issue of material fact concerning those standards. Because the Court of Appeals decided the first question in Respondent's favor, the second and third were not even discussed (Petition at p. 5a).

Ignoring those questions, Petitioner's argument for granting certiorari rests, first, on his claim that the grant of Respondent's motion for summary judgment by the United States District Court for the District of Rhode Island without oral argument or a jury trial was such a variation from usual and accepted procedures as to call for this Court to exercise its powers of supervision (Petition at p. 2). According to Petitioner, Rhode Island and Massachusetts law on libel and, by analogy, the principles concerning the determination whether someone is a public figure set down in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974), require that a jury determine whether the articles were capable of any defamatory meaning (Petition at pp. 5-7). However, Petitioner misconstrues applicable state law and his reliance on *Gertz, supra,* is therefore irrelevant. Second, Petitioner argues that the Court of Appeals decision conflicts with standards set out by this Court in *New York Times, supra, Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), and *Gertz, supra,* and that libel law standards require clarification. Since the articles are not capable of any defamatory meaning, this question is never reached.

The action of the District Court, as affirmed by the Court of Appeals, was clearly sound and proper and in accordance with applicable state law. Respondent urges that this Court deny the Petition for Certiorari because there is no showing that the action of the District Court,

and the affirmance thereof by the Court of Appeals, was so substantially in error to require this Court to exercise its supervisory powers.

Statement of Facts

Petitioner's Statement of Facts (Petition at pp. 2-4) is satisfactory in all but two important respects.

First, Petitioner neglects to note that he admitted on deposition the substantial truth of all of the material facts of Respondent's articles, including the accuracy of the articles insofar as they relate to the charges filed against him and the fact that he did shoot and kill McCabe. The District Court found the articles to accurately reflect the incident which occurred (Petition at p. 13a) basing its finding in part on these admissions in Lambert's deposition (Petition at p. 31a). The Court of Appeals also acknowledged the admitted truthfulness of the published articles (Petition at p. 5a).

Second, Petitioner inaccurately describes Petitioner's Complaint as alleging that Respondent "maliciously published [such] libelous statements by stating that Plaintiff had murdered one Thomas McCabe and that in doing so he had committed 'an actual murder' (Footnote 5, Appendix B, p. 26) and further that Thomas McCabe was a murder victim" (Petition at p. 3). None of the articles state that Lambert "murdered" McCabe. The articles only use the word "murder" to describe, correctly, the charges filed against Lambert or to modify the word "victim" in reference to McCabe. Lambert alleged that the articles were *understood to mean* that a murder was committed of which he was guilty. This is what the Court of Appeals correctly understood as the essence of his claim (Petition at p. 5a, Footnote 5).

Reason for Denying the Petition

THE DISTRICT COURT'S GRANT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND THE COURT OF APPEALS DECISION AFFIRMING THAT ACTION WERE PROPER EXERCISES OF JUDICIAL POWER IN ACCORDANCE WITH STATE LAW.

Petitioner grounds his argument that the District Court acted improperly on an incorrect understanding of Rhode Island and Massachusetts law which the District Court and the Court of Appeals accurately perceived and followed. Petitioner correctly summarized that law as holding "that unless the words used by the Providence Journal were plain and unambiguous and incapable of carrying a defamatory innuendo there is a question of fact for the jury" (Petition at pp. 5-6). However, Petitioner then argues that the unrebutted testimony of three individuals shows that the language is capable of carrying defamatory meaning and therefore a factual question exists. This is a superficial, and as a result incorrect, analysis of the law regarding libel.

The law in question contemplates two steps in the determination of whether language is defamatory by innuendo. First, the Court must decide if the language is capable of defamatory meaning. This is analogous to the decision-making process that takes place when a judge grants a directed verdict or a judgment notwithstanding the verdict, and in so doing determines that certain evidence cannot or does not, as a matter of law, sustain a verdict. Only if a Court finds a defamatory meaning possible does the question of fact arise whether the language was actually understood to be defamatory. As a logical matter, the first step must take place if courts are ever to grant summary judgment in libel matters.

In addition, if Petitioner was correct, there would be an enormous chilling effect on the exercise of First Amendment rights. Any person could force a trial in a libel action by merely submitting affidavits of individuals stating that, notwithstanding what the actual language states, the language was understood by that individual to have a defamatory meaning. This Court has recognized the deterring affect on free speech created by the burden of full litigation. See *New York Times* v. *Sullivan, supra,* at p. 279.

Petitioner cites the case of *Della Posta* v. *Rand Express Freight Lines,* 86 R.I. 148, 133 A.2d 775 (1957), to support his contention that it is a jury question whether language is capable of any defamatory meaning. The Rhode Island Supreme Court said in that case:

> ". . . Where the language complained of is plain and unambiguous it is for the court to say whether or not it is slanderous." *Della Posta* v. *Rand Express Freight Lines, supra,* at p. 154.

Though the *Della Posta* case did not deal with libel by innuendo, the principle espoused is that the Court must make an initial determination of whether the language is capable of a defamatory meaning or is defamatory per se. Where the alleged libel is written, only the articles themselves are relevant to a Court's initial evaluation and individual opinions of members of the community are not. Only when a defamatory meaning is possible, as a matter of law, is a case submitted to the jury. Otherwise, Rhode Island and Massachusetts Courts will grant the defendant a summary judgment in its favor. See, for Rhode Island law, *Bray* v. *Providence Journal Co.,* 101 R.I. 111, 220 A.2d 531 (1966), *Connery* v. *Kalian,* 99 R.I. 60, 205 A.2d 587 (1965), *Ogrodnick* v. *Providence Journal Co.,* 93 R.I.

316, 175 A.2d 289 (1961), *Reid* v. *Providence Journal Co.*, 20 R.I. 120, 37 Atl. 637 (1897), and *Hackett* v. *Providence Telegram Publishing Co.*, 18 R.I. 589, 29 Atl. 143 (1894), and, for Massachusetts law, *Sharratt* v. *Housing Innovations, Inc.*, 310 N.E.2d 343 (Supreme Jud. Ct. of Mass., 1974), *Joyce* v. *George W. Prescott Publishing Co.*, 348 Mass. 790, 205 N.E.2d 207 (1965), *Ricci* v. *Crowley*, 333 Mass. 26, 127 N.E.2d 652 (1955), and *King* v. *Northeastern Pub. Co.*, 294 Mass. 369, 2 N.E.2d 486 (1936).

The grant of Respondent's motion for summary judgment by the District Court was a proper and sound exercise of judicial power. No oral argument or jury trial was necessary. This Court therefore has no reason to exercise its supervisory powers.

Moreover, the District Court and the Court of Appeals were correct on the merits in their decisions. The Court of Appeals concisely stated the issue in this case and its ruling thereon:

> "Even if the use of the term 'murder' implied that the killing was unlawful, each article unequivocally states that Lambert has 'denied' the murder charge or 'pleaded innocent,' or reports the progress of the case in such a way as to make clear that no determination of his involvement has been made. Nothing in them suggests that the Journal has concluded that Lambert is the guilty party even if it has decided that there was a murder (footnote omitted). Moreover, the term 'murder' is used interchangeably throughout with the terms 'fatal shooting,' 'shooting death,' and 'homicide,' often in the same or adjacent sentences. In this context the term clearly is chosen solely for variety's sake and merely echoes the report of the charges levelled against Lambert without implying their truthfulness. It is obviously to be understood

as 'alleged murder.' In these routine news articles we think it would require more forceful language than this to justify Lambert's reading.[8] The innuendo cannot be used to enlarge the natural meaning of the words actually used. *Ogrodnick* v. *Providence Journal Co.*, 93 R.I. 316, 317, 175 A.2d 289, 291 (1961); *Colby Haberdashers, Inc.* v. *Broadstreet Co.*, 267 Mass. 166, 170, 166 N.E. 550, 551 (1929). None of these articles can be construed to impute guilt without such an enlargement."

"[8] The context shows that the single use of the phrase 'actual murder' in the last article served to distinguish the murder charge from the earlier accessory charge and could not be read to assert the conclusion that the killing was unlawful. (Petition Appendix B, pp. 6a-7a)."

Conclusion

This Court should deny certiorari because the Petitioner has made no clear showing of procedural error and there is no need to reach any questions of clarification of case law relating to libel actions.

Respectfully submitted,

KNIGHT EDWARDS
Attorney for Respondent

Of Counsel:
EDWARD F. HINDLE
TERRENCE M. FINN
EDWARDS & ANGELL
2700 Hospital Trust Tower
Providence, Rhode Island 02903